

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DONALD DAVIDSON	:	DETERMINATION
OFFICER OF TRI-ARTS PRESS, INC.	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1984	:	
through May 31, 1984.	:	

Petitioner, Donald Davidson, officer of Tri-Arts Press, Inc., 22 Stonewall Lane, Mamaroneck, New York 10543, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through May 31, 1984 (File No. 802807).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 9, 1987 at 9:15 A.M., with all briefs to be submitted by March 9, 1988. Petitioner appeared by Norman R. Berkowitz, Esq. The Audit Division appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner.

II. Whether petitioner timely filed an application for an administrative hearing relative to the aforesaid notice of determination.

III. If such application was not timely filed, whether the amount of tax assessed against petitioner pursuant to the notice of determination is fixed or whether such amount may be reduced to reflect a lesser amount claimed against the corporation for which petitioner was held, by the Audit Division, to have been liable as a responsible officer thereof.

FINDINGS OF FACT

1. On June 20, 1985, the Audit Division issued to Donald Davidson (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended November 30, 1983 and May 31, 1984 in the amount of \$150,259.97 (\$67,415.61 for the period ended November 30, 1983 and \$82,844.36 for the period ended May 31, 1984), plus penalty and interest, for a total amount due of \$175,718.66. The notice of determination contained the following explanation:

"THE TAX ASSESSED ABOVE HAS BEEN ESTIMATED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138(a)(1) OF THE TAX LAW. SEE ADDITIONAL INFORMATION ON BACK OF THIS NOTICE.

You are liable individually and as officer of (_ Tri Arts Press, Inc.) under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

2. The aforesaid notice of determination was mailed, by certified mail, on June 20, 1985 to petitioner at 22 Stone Wall Lane, Mamaroneck, New York 10543.

3. In response to this notice, petitioner's representative at the time, Edward C. Kramer, Esq., signed Form TA-11, Petition, dated the Petition August 17, 1985, attached a two-page letter on the stationery of Olanoff & Kramer, Attorneys at Law, signed by Mr. Kramer and dated August 19, 1985 and, on September 18, 1985, applied a machine-metered stamp to the envelope using the postage meter in his office. He then deposited the envelope in the mail depository in the Graybar Building at 420 Lexington Avenue in New York City, the location of the law offices of Olanoff & Kramer.

4. The Petition and attached letter were received by the Tax Appeals Bureau of the former State Tax Commission on September 24, 1985. The envelope containing the aforesaid documents bore a machine-metered stamp with a date of September 18, 1985 and also bore a United States Postal Service postmark of September 19, 1985.

5. On the sales tax return of Tri-Arts Press, Inc. for the sales tax quarter ended November 30, 1983, gross sales were erroneously listed in the taxable sales column of the return which resulted in an assessment being issued for said period in the amount of \$67,415.61 (see ____ Finding of Fact "1"). An amended return was filed on July 24, 1986 which correctly stated tax

7. On or about July 24, 1986, the State Tax Commission filed a claim against Tri-Arts Press, Inc. in the amount of \$153,900.45 in the United States District Court, Southern District of New York relating to a bankruptcy proceeding commenced by the corporation in this Court. On December 16, 1986, the State Tax Commission filed an amended claim which indicated that, based on sales tax returns filed for the two sales tax quarters originally at issue, the amended claim was only for the period March 1, 1984 through May 28, 1984 and was amended to reflect tax due of \$20,033.01, plus interest. The \$20,033.01 was the identical amount contained in the corporation's sales tax return filed subsequent to the issuance of the original assessment (see ___ Finding of Fact "6").

8. Petitioner contends as follows:

a. the notice of determination, issued by the Audit Division on July 20, 1985, was not mailed, as statutorily required, by registered or certified mail and, as a result thereof, the 90-day period for filing a petition commenced upon date of receipt rather than upon date of issuance;

c. the proper amount of tax due is \$20,033.01; and

d. the notice of determination issued to petitioner is null and void since the use of

estimates is improper where the Audit Division has failed to examine a taxpayer's books and records which were complete and readily available.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a) (former [1] and [2]), in effect for the period at issue, provided as follows:

"(a)(1) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors. Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same.

(2) Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days."

B. Tax Law § 1147(a)(1) provides as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

The Notice of Determination and Demand for Payment of Sales and Use Taxes Due was sent, by certified mail, to petitioner at the proper address on June 20, 1985 and the 90-day period for application for a hearing, therefore, commenced on that date. Such 90-day period expired on

September 18, 1985.

C. In Matter of Harron's Electric Service, Inc. (Tax Appeals Tribunal, February 19, 1988) the Tribunal held that the provisions of 20 NYCRR 535.1 shall determine the delivery dates of sales tax documents when mailed. 20 NYCRR 535.1(b)(1)(iii) provides, in pertinent part, as follows:

"The envelope or other wrapper containing the document must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing such document). If the postmark stamped by the United States Postal Service on the envelope or wrapper containing the document does not bear a date which falls within the prescribed period or on or before the prescribed date for filing such document in accordance with this Subchapter, the document will be considered not to be timely filed, regardless of when the envelope or wrapper containing such document is deposited in the mail."

20 NYCRR 535.1(b)(2)(iii) provides, in pertinent part, as follows:

"If the envelope or wrapper containing the document has a postmark made by the United States Postal Service in addition to the postmark not so made, the postmark which was not made by the United States Postal Service will be disregarded...."

When received by the Tax Appeals Bureau on September 24, 1985, the envelope containing the petition had a metered stamp dated September 18, 1985 and a United States Postal Service postmark bearing the date September 19, 1985. Since the 90-day period for application for an administrative hearing expired on September 18, 1985, the petition herein was untimely and, as indicated in Tax Law § 1138(a) (former [1]) (Conclusion of Law "A", supra), the tax is finally and irrevocably fixed.

D. As indicated in Finding of Fact "7", supra, the corporation's sales tax return for the quarter ended May 31, 1984 was accepted by the Department of Taxation and Finance as evidenced by the amended claim filed in the corporation's bankruptcy proceeding. In a similar matter wherein the corporate officer failed to timely apply for a hearing to contest his personal

liability for corporate sales and use taxes, the court, in *Halperin v. Chu* (134 Misc 2d 105, 108, affd AD2d [March 31, 1988]), stated that "any redetermination decreasing the corporation's tax liability will result in a decrease of petitioner's personal liability notwithstanding the amount stated in the warrant". While, as indicated in Conclusion of Law "C", supra, petitioner failed to timely apply for an administrative hearing to contest his personal liability for the sales and use taxes of Tri-Arts Press, Inc., his liability must be reduced to the amount determined to be due from the corporation. Since the corporation's liability for the period at issue was conceded to be \$20,033.01, petitioner's liability must also be reduced to this amount.

E. Petitioner's allegations relative to the notice of determination being null and void because the Audit Division failed to examine the complete books and records of the corporation and, instead, improperly estimated the amount of the assessment herein shall not be addressed herein. The propriety of the assessment is a substantive issue which is the proper subject of an administrative hearing on the merits of such assessment. Because of his failure to timely apply for such a hearing, petitioner's objections to the assessment are waived and, while properly reduced (see ___ Conclusion of Law "D"), the assessment is finally and irrevocably fixed.

F. The petition of Donald Davidson, officer of Tri-Arts Press, Inc. is granted to the extent indicated in Finding of Fact "5" and Conclusion of Law "D"; the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1985 accordingly; and, except as so granted, the petition is in all other respects dismissed.

DATED: Albany, New York
April 14, 1988

ADMINISTRATIVE LAW JUDGE